

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BETTY RADVILLAS,

Plaintiff,

vs.

10-CV-0733-JAP-GBW

JACQUELINE E. FRYAR,

Defendant.

PROPOSED FINDINGS AND RECOMMENDATION ON DISPOSITION

THIS MATTER is before the Court on the parties' submission of briefing regarding the issue of federal subject matter jurisdiction. *Docs. 20, 21, 22*. On December 16, 2010, I ordered the parties to brief whether this Court has subject matter jurisdiction over this case. *Doc. 20*. Upon review of the parties' briefs, applicable law, and the record before me, I find that this Court lacks subject matter jurisdiction and recommend this case be remanded to state court.

On August 5, 2010, Defendant removed this case to federal court. *Doc. 1*. In its Notice of Removal and Answer, Defendant asserted the existence of federal jurisdiction on the basis of a federal question, specifically that Plaintiff's Complaint included a count for alleged violation of rights under the First Amendment to the United States Constitution. *Doc. 1* at 1; *Doc. 2* at 4. In Plaintiff's Complaint, Count II is entitled "Assault and Battery and Violation of the First Amendment." *Doc. 1*, Ex. A at 5. Upon review of the claim,

however, it appeared to be based upon the alleged assault on a private citizen by another private citizen due to some dispute about a political issue. While the motivation for the alleged assault may have been a disagreement about another's exercise of free speech, such would not ordinarily establish a First Amendment claim because the "First Amendment does not normally restrict the actions of purely private individuals" *Granbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987). Given the Court's independent duty to determine subject matter jurisdiction, the parties were directed to "submit additional briefing analyzing whether Plaintiff has pled a valid First Amendment claim, and, if not, if there is some other basis of federal subject matter jurisdiction." *Doc. 20* at 2. Both parties have submitted their briefs and concede that this Court lacks subject matter jurisdiction. *Docs. 21, 22*. I agree.

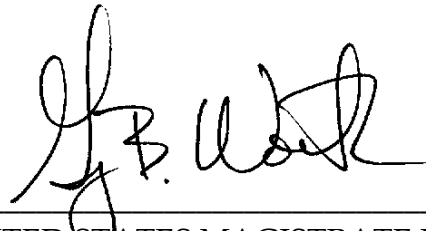
The facts set forth in the Complaint show that Defendant is a resident of Catron County, New Mexico, and that on October 8, 2009, Defendant allegedly verbally and physically assaulted Plaintiff at the Village of Reserve Board of Trustees Special Meeting. *Doc. 1*, Ex. A. The Complaint provides no facts that would support a finding that Defendant was a state actor at the time of the alleged assault. Both parties agree with this assessment. *Doc. 21* at 2 (Defendant asserting that she "was not a state actor with regard to Plaintiff's First Amendment claim");¹ *Doc. 22* at 1 (Plaintiff stating that Defendant was

¹ The court notes that, although Defendant agrees that she was not a state actor for the purposes of the First Amendment, she contends that she was a "public employee" for the purposes of the New Mexico Tort Claims Act. *Doc. 21* at 1. This

never a state actor for purposes of her claims). If Defendant was not a state actor for the purposes of First Amendment protection, then no valid First Amendment claim exists. *Granbouche*, 825 F.2d at 1466; *see also Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). Moreover, the parties have not argued that any other basis of federal subject matter jurisdiction is present in this case. Accordingly, I recommend the case be remanded.

Wherefore, **IT IS HEREBY RECOMMENDED THAT** this case be **REMANDED** to state court for lack of federal subject matter jurisdiction.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1)(c). A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.



UNITED STATES MAGISTRATE JUDGE

Court, of course, need not and does not express any opinion regarding that statutory issue.